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No. 90-1947

In the Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE YEE, *et al.*,

Petitioners,

v.

CITY OF ESCONDIDO, a municipal corporation,

Respondent.

On Certiorari from the
California Court of Appeal

BRIEF OF AMICUS CURIAE THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE.

The Apartment Association of Greater Los Angeles ("Amicus") is a nonprofit mutual benefit corporation founded in 1917 whose individual and organizational members are involved in offering residential properties for rent primarily in the County of Los Angeles, California. At present Amicus has approximately 27,000 members.

Since 1978, Amicus has been both legislatively and judicially involved in apartment rent control matters.

Amicus believes that the distinctions between mobilehome park rent control and apartment rent control are constitutionally insignificant and that, therefore, the decision of this Court may have a substantial impact on rent control laws applicable to apartment owners as well.

SUMMARY OF ARGUMENT.

The touchstone for Judge Kozinski's decisions in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied* 485 U.S. 940 (1988) and *Azul Pacifico v. City of Los Angeles*, ____ F.2d ____ (91 Daily Journal D.A.R. 13599) (9th Cir. 1991) is that under a mobilehome park rent control system without vacancy decontrol the mobilehome park tenant obtains a benefit which he or she can sell to the incoming tenant, whereas in ordinary apartment rent control no such monetary benefit is realized by the departing tenant.

However, from the perspective of the landlord, there is very little difference in the impact on the landlord from mobilehome park rent controls and from ordinary apartment rent controls. In either case, the landlord retains essentially the same rights and suffers the same detriments.

Since the Constitution protects property owners from governmental confiscation—and does not preclude tenants from realizing windfall profits—the fact that the mobilehome park owner's loss is transferred to a single tenant rather than being diffused among a series of tenants as with apartment rent control seems constitutionally irrelevant.

While there is a clear taking in the instant case, there is no consistent theory to distinguish this taking from many other rent ordinances applicable to ordinary

residential rental properties. Amicus suggests that the remedy is not to create an artificial distinction between mobilehome parks and apartments, but to provide a methodology for meaningful review of all rent control ordinances. Labeling the effect of the mobilehome park rent control as a "physical taking," with its heightened scrutiny, on the one hand and apartment rent control as "mere economic regulation" on the other hand, with virtually no scrutiny, does not recognize the reality of either the economics or the ordinances. Amicus submits that there is a continuum between the two end points of "physical taking" and "economic regulation" with, for the reasons stated herein, rent control falling toward the "physical taking" side. The degree of scrutiny of ordinances for a constitutional taking should be flexible and should take into account where on the continuum the ordinance in question lies.

Such scrutiny should include a close review of the alleged nexus between the burdens imposed by the various elements of the rent control law in question and those legitimate governmental purposes which may lawfully be imposed on individual landlords. Where the cost of any particular provision of a rent control law cannot justly be imposed on the landlords, the cost should be borne by the general public.

ARGUMENT.

I.

There Is No Constitutionally Significant Difference Between Mobilehome Park Rent Control And Apartment Rent Control.

An apartment landlord suffers virtually identical burdens from rent controls as does a mobilehome park owner. He cannot terminate any existing tenant except

for good cause, notwithstanding the terms of an existing lease. He is denied possession even after the expiration of a tenant's lease[1] and is required to accept less than fair market value for this dispossession. While technically an apartment landlord has more freedom in selecting the new tenant, in reality this freedom has little value and may even be a detriment.[2]

For example, in *Hall*, Judge Kozinski suggested that an ability to limit occupancy to smaller families was an economic benefit retained by apartment landlords. *Hall v. City of Santa Barbara*, *supra* at 1279, n. 23. However, such a practice would probably be illegal today under both title VIII of the United States Civil Rights Act (42 U.S.C. Section 3601 *et seq.*) and the California Unruh Civil Rights Act (California Civil Code Section 51.2).

In order to comply with the various fair housing requirements, most landlords reject only those tenants who do not meet the financial criteria established to

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[1]Manheim, *Tenant Eviction Protections and the Takings Clause*, 1989 Wisconsin L. Rev. 925, 993 (1989),

> Not only do all modern eviction laws confer on existing tenants rights approaching life tenure, but succeeding tenants will have the same rights, and so on, as long as the landlord chooses to rent the premises. The identity of the tenant may change over time, but that affects neither the duration nor the nature of the occupation.

[2]*Id.* at 997,

> However, the [*Hall*] court's concern for the landlord's ability to control the identity of tenants was overblown. This property right has waned in significance due to a plethora of statutory and judicial mechanisms which have arisen to restrict the landlord's discretion.

determine ability to pay rent.[3] However, use of these financial criteria for new tenants is not a benefit exclusive to apartment owners, as it is also allowed to mobilehome park landlords under California law.[4]

The fact that an apartment owner may have the right to keep the rental unit off of the rental market also does not create a constitutionally significant difference. In *Loretto*, the Court held that the taking was not defeated merely because the landlord might terminate his rental business when a tenant vacates or at any other time.[5]

Finally, the right to select new tenants in owner-occupied two or three-unit apartment buildings may have significant personal value, but most rent control laws exempt these buildings from the controls anyway.

In summary, an apartment landlord would usually prefer the mobilehome park situation—that a terminating tenant be obligated to find a new tenant. In that way, the owner could save not only the time and effort of finding a new tenant, but the potential loss of monthly income until a new tenant is found.

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[3]Use of these criteria was upheld in *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873 (1991).

[4]California Civil Code Section 798.74.

[5]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n. 17 (1982).

II.

The Taking Of The Owners' Properties In Mobilehome Park Rent Control Is More Obvious Than In Apartment Rent Control, But Not More Real.

When the smoke had cleared after the adoption of the mobilehome park rent controls in *Hall* and *Azul Pacifico*, it could be clearly seen that the tenant was left holding the "stick" called the landlord's reversionary interest. With the obvious transfer of this "stick" from the owner to the tenant, Judge Kozinski applied the strict *Loretto*[6] standard of a "physical taking" rather than the "regulatory" standard of, for example, *Penn Central*.[7]

However, that particular stick is also taken by rent control laws from apartment owners. Why should not the *Loretto* standard or some similar review apply to them as well?

The distinction between mobilehome park rent control and apartment rent control is merely that the confiscatory effect of rent control on the mobilehome parks is more obvious, not more real. As stated in Epstein, *Rent Control And The Theory Of Efficient Regulation*, 54 Brooklyn L. Rev. 741, 759 (1988),

> Rent control is politically palatable and constitutionally allowable because it is a form of disguised confiscation. Once that confiscation is made explicit, the practice cannot survive criticism. When the tenant sells the landlord's reversion and pockets the landlord's money, the situation becomes clear enough for all to see. *Hall* embodies an unconstitutional rent control scheme, but no more so than any other.

[6] *Loretto v. Teleprompter Manhattan CATV Corp., supra.*

[7] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The California Court of Appeal below agreed with this logic, but reached the opposite conclusion. It agreed that, "[i]n both [apartment and mobilehome park] cases, however, the value 'taken' from the property owner is conceptually identical." *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1356, 274 Cal. Rptr. 551 (1990). However, rather than concluding that similar rent controls on apartments constitute a taking, the court concluded that therefore the mobilehome park rent control did not effect a taking.[8]

In light of the *Hall*/ *Yee* decisions, Amicus submits that when an outcome is so dependent upon the mere label given to the activity, the underlying legal principle giving rise to the distinction must be clearly articulated.

III.

Restrictive Rent Control Is Closer To A Physical Taking Than To Mere Regulation And Therefore Requires Closer Scrutiny.

It is, of course, too late in the day to argue that rent control ordinances are per se unconstitutional,[9] nor

[8] However, the California court felt constrained by prior California authority to hold that apartment rent controls did not effect a taking.

[9] As stated in *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988),

> Despite amici's urgings, we see no need to reconsider the constitutionality of rent control per se.

would Amicus make such an argument. On the other hand, merely labeling an ordinance "rent control" should not insulate it from constitutional review.[10] Whether a rent control ordinance is within the police power should be a different question from whether the ordinance effects a taking.

For example, surely a municipality could not solve its welfare problems by issuing entitlements to qualified, low-income persons authorizing them to simply take, without paying, whatever food and clothing they need from private retail stores, where the only recourse for the store would be to petition the government to allow the store to cease honoring such entitlements upon proof that to honor any further entitlements would result in the store's receipt of less than a constitutionally minimum return. Such a welfare scheme imposed entirely on the private food and clothing industry would clearly be a taking. Yet, there is no constitutional distinction between this hypothetical and many of the rent control laws now in effect, including the one at issue here.

Rent control is simply a wealth transfer from one group to another. Whether it thereby becomes closer to a taking or an economic regulation requires an examination of the justifications for other rate regulations. However, classical justifications for rate regulation are based on situations clearly distinguishable from rent control. First, there is presently no emergency justifying constitutional infringements. With the

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[10] *Id.* at 22 (Scalia, J., dissenting),

> The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals.

exception of *Pennell v. City of San Jose*, *supra*, the previous rent control ordinances considered by this Court involved wartime emergencies. The Court upheld the controls on the ground that laws addressing such emergencies which are limited in time "to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." *Block v. Hirsh*, 256 U.S. 135, 157 (1921), quoted in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J. dissenting from dismissal).

Second, public utilities with their concomitant governmental monopolies and other private activities involving property devoted to public use clearly justify a regulation of the rates charged by the utility or activity.[11] However, residential rental properties are neither of these.

Third, a common justification for rate controls is that the activity involves a monopoly or is approaching a monopoly. *FPC v. Texaco Inc.*, 417 U.S. 380, 397-98 (1974) (holding that federal regulation of the natural gas market was in response to the threat of monopoly pricing.) However, residential rental housing is not a monopoly nor anywhere near approaching a monopoly. In *Azul Pacifico v. City of Los Angeles*, *supra* at 91 Daily Journal D.A.R. 13601, Judge Kozinski held that mobilehome park owners do not enjoy a monopoly or even a near monopoly. Yet, the apartment residential rental market is far more diversified than the mobile-home park industry.

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[11] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1988).

> It is, of course, settled beyond dispute that regulation of rates chargeable from the employment of private property *devoted to public uses* is constitutionally permissible. (emphasis added)

Fourth, otherwise unconstitutional regulation has been permitted where the activity is determined to be "noxious."[12] However, residential rental housing cannot be classified as a noxious activity.

Fifth, the justification for permitting broad police power authority in land use matters is based on the notion that such land use ordinances have burdens and benefits flowing both ways. There is thus a "reciprocity of advantage." An owner cannot point to the burdens and claim a taking while, at the same time, ignore the reciprocal benefits.[13] On the other hand, without any reciprocal benefits, a regulatory taking will more easily be found.[14] There is, however, no "reciprocity of advantage" at all for landlords in rent control legislation.

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[12] *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491 (1987)

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

[13] *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 520, 125 Cal. Rptr. 365, 375, 542 P.2d 237, 246 (1975) (characterizing zoning as "not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another: rather it involves reciprocal benefits and burdens.") *cert. denied* 425 U.S. 904 (1976).

[14] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Penn Central Transportation Co. v. City of New York, supra* at 139-40 (1978) (Rehnquist, J., dissenting). *See, also*, Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U. L. Rev. 297 (1990).

Sixth, landlords are certainly not the cause of any housing shortage. Of course, it may be debated back and forth as to whether rent controls effectively serve a legitimate public purpose in providing affordable housing, but the fact that they may serve a public purpose does not answer the question as to whether or not they effect a taking.

The only cogent rationale given for imposing rent controls on landlords is that landlords, while not causing the alleged rental housing shortage, do stand to profit from it.[15] However, this should not stop the constitutional inquiry.

For example, under this rationale, what is the justification of rent controls that do not permit rents to simply keep pace with inflation?[16] Modern rent control laws are enacted on the alleged basis of a shortage of rental housing and contain "rollback" provisions requiring that existing rents at the time of the enactment be "rolled back" to the rents in effect at some prior date specified in the ordinance. This date is selected, and its use justified, on the theory that the date selected was the last time when the rental marketplace was in

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[15] *See, Pennell v. City of San Jose, supra*, at 20-22 (Scalia, J., dissenting); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-12 (1944) ("The primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies.")

[16] United States Department of Housing and Urban Development, Report to Congress on Rent Control, at 9 (1991) ("The most severe ordinances now in place in the United States allow for rent increases that are well below inflation and do not permit vacancy decontrol.")

equilibrium.[17] However, once the rents have been rolled back to a period when the marketplace was in equilibrium, what is the constitutional justification for thereafter keeping the rent increases below the inflation rate?

Amicus respectfully submits that it is exactly these provisions in the Escondido ordinance which have created the vast majority of the rent control premium for the mobilehomes at issue in the present case. The cause of the problem before this Court is not the mobilehome park tenants' ability to sell their mobilehomes at rent control premiums. Rather the cause of the problem is a rent control law which has created this significant rent control premium by year after year after year forcing landlords to charge less and less rent in terms of real dollars. This problem is identical for mobilehome park owners and apartment owners.

Finally, rent control is a beguiling political tool. It creates a wealth transfer whose costs are imposed wholly on a small minority. The expense is entirely off-budget with no effect on the public purse. Whether rent control actually serves its alleged social purpose of providing affordable housing or whether it is merely a means for politicians to buy votes with other people's money, in either case it is the burdening of a minority by a majority which cries out for the heightened constitutional scrutiny

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[17] *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 166, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) (stating that the rollback date is used "as a starting point for the fixing of maximum rents on the theory that it approximates the rent that would be paid in an open market without the upward pressures that the imposition of rent control is intended to counteract."). *See, also, Vega v. City of West Hollywood*, 223 Cal. App. 3d 1342, 1352, 273 Cal. Rptr. 243, 249 (1990).

enunciated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

IV.

The Guarantee Of A Constitutional Return Is Presently An Empty Protection.

Rent control laws have withstood facial attacks when it can be shown by their terms that an owner could receive a "just and reasonable return" thereunder. However, notwithstanding decades of rent control litigation, no court has provided any useful assistance as to what actually constitutes a "just and reasonable return" as required by the Constitution. It is an extremely complex issue requiring, as noted in *FCC v. Florida Power Corp.*, *supra* at 254 (Powell, J., concurring), "careful consideration of the relevant statute, the action of the regulatory commission, and a complex of other factors," whatever all this may entail.

While it may be economically feasible for Hope Natural Gas Co. or Florida Power Corp. to litigate this difficult question, it is not at all economically feasible for the average landlord to do so. Instead, landlords have no option but to wait and hope that this nebulous, undefined standard will someday be clarified so that they may meaningfully assert their constitutional rights. In the meantime, without effective judicial protection of the landlords' rights, municipalities will continue to push the constitutional envelope, enacting more and more stringent rent control laws and regulations until the courts finally enunciate the boundaries beyond which the municipalities may not go without the expediency of paying for it.

CONCLUSION.

Amicus respectfully requests the Court reverse the decision of the California Court of Appeal below. In its holding, Amicus requests the Court recognize that the constitutional infirmities of the Escondido Mobilehome Park Rent Control laws are not unique to either Escondido or to mobilehome parks and the Court hold that rent control laws will be closely scrutinized as to the relationship between their costs and the justifications whereby it is contended that such costs may be borne solely by the landlords.

Dated: November 27, 1991

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Apartment Association of Greater Los Angeles

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on November 27, 1991, I served the within ***Brief of Amicus Curiae The Apartment Association of Greater Los Angeles in Support of Petitioners*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 1991, at Los Angeles, California.

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